UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA ex rel. MELAN DAVIS and BRAD DAVIS, Plaintiffs,	)	
v.	)	Case No.1:08-cv-1244-TSE-TRJ
US TRAINING CENTER, INC. Defendants.	)	

MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT FOR MR. PRINCE

Relators respectfully request that the Court reconsider its order granting summary judgment to Erik Prince (Dkt. No. 457). Reconsideration is merited because new evidence has come to light that wholly undermines the Court's finding of fact regarding the OIG audit. In such circumstances, the Court should hear a motion for reconsideration. *See Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99 (4th Cir. 1983), explaining that a party who acquires favorable evidence after a ruling would be subjected to a "grievous wrong" unless the Court has the power to reconsider its prior ruling.[1]

[1] Relators are not unmindful of the fast-approaching July 25 trial date. Were the Court to withdraw its grant of summary judgment in Mr. Prince's favor in light of the new evidence, Relators propose that the Court sever the claims against Mr. Prince, and hear evidence at a very short bench trial after the jury trial concludes. (If the jury finds for USTC, the Court may enter summary judgment on Prince at that time.) That way, the Court could hear a very limited body of evidence (two or three witnesses from Relators' side) focused exclusively on Mr. Prince's knowledge and role. The Court would be the ultimate decision-maker as with summary judgment, but with the ability to assess personally the credibility of the witnesses. Relators believe such an approach eliminates any prejudice to either party, and makes the Court's decision far less susceptible to any challenge on appeal.

I. THERE IS NEW EVIDENCE PROVING STATE DEPARTMENT DID NOT REJECT THE OIG REPORT.

The Court was led to believe that the State Department had rejected the OIG audit report prepared by Cotton & Company as inaccurate and unreliable.[2] In granting Mr. Prince summary judgment, the Court cited to the "fact" that the State Department "did not find the audit report to be accurate or worth investigating further." *Dkt. 457 at 16.* The Court reasoned therefore, that "the 'red flag' status of the audit reports, like a mirage, disappears when closely examined." *Dkt. No. 457 at 17*.[3]

On July 6, 2011, the State Department authorized David L. Cotton to testify as a government representative under the *Touhy* regulations. *See Exhibit 1*. On July 7, 2011, Mr. Cotton prepared and provided a declaration. *See Exhibit 2*. As explained in the Declaration, Mr. Cotton prepared the OIG report and has first-hand knowledge of the facts surrounding the State Department's use of the OIG report. He directly contradicts Defendant's claim that the State Department rejected the OIG audit report as inaccurate.

The facts are far different. The State Department has been hiring Mr. Cotton and his firm for the past 22 years. The firm has conducted more than 200 audits and consulting assignments for the State Department, with Mr. Cotton personally directing many of them. *See Exhibit B* at ¶ 4-5. The Department has ***never*** rejected, contested or deemed unreliable any audit or consulting report issued by Cotton & Company. *Id. at ¶ 6.* The Department did not do so with the report in question. *Id. at ¶ 18.* Quite the contrary – as is explained in the Declaration, the State Department issued a joint report that echoed the findings of the Cotton & Company report, and

[2]Sworn testimony from Ms. Morrison-Esposito to that effect also misled Relators. Relators erred by not being more skeptical of Ms. Esposito's testimony given that Relators knew she failed to testify truthfully about the GEMS data.

[3] Defendant in turn relied heavily on the Court's language in an effort to exclude Mr. Cotton's testimony.

faulted the lack of oversight by the very State Department officials who have been helping Defendant here. *Id. at ¶ 27-31.*

Messrs. Issacs and Bohac filed declarations stating they "questioned" and "did not accept" the OIG audit report. Yet those litigation positions are inconsistent with their conduct at the time. Neither man questioned the OIG's conclusion about timekeeping issue during the audit, although the issue was flagged and discussed. *Id. at ¶ 11-18.*

Mr. Cotton provided State Department officials Issacs and Bohac (and others) with a draft report that stated "[w]e believe that the context of the discussion regarding time cards makes it clear that the CO was not agreeing that Blackwater was not required to prepare and maintain an adequate time-and-attendance system." *Id. at ¶ 16.* Despite having ample opportunity to do so, these officials did not object to this finding. *Id. at ¶ 11-18.* As Mr. Cotton explains, had they done so, he would have referred the matter to the OIG for further investigation. *Id. at ¶ 17.* (Blackwater, however, did object – vehemently – with the same arguments being made now.)

Messrs. Issacs and Bohac also withheld from the OIG audit team an email they received from Blackwater's Deputy Project Manager Chris Story, located in Iraq. *Id. at ¶ 32.* In that email, Mr. Story alerts the State Department that Blackwater intentionally overbilled the government. *Id.* [4]

Mr. Cotton also explains in detail how *every* member of the executive team (Howell, Jackson, Roitz, Esposito, Taylor) made verbal and written misrepresentations to the OIG audit team. *Id. at ¶ 36-41.* Among other things, the executive team intentionally withheld from the

[4]That Messrs. Issacs and Bohac want to shield Blackwater from accountability does not give them the power to do so. Government officials lack that power to ratify billing fraud after it has occurred. *See United States v. National Wholesalers*, 236 F.2d 944 (9th Cir. 1956).

OIG audit team the BDO Seidman investigative report on the Amman operation. *Id. at ¶ 37- 38.* This new evidence makes clear that Blackwater's top management (Howell, Jackson, Roitz, Esposito and Taylor) acted in concert to mislead the OIG audit team.

II. SUMMARY JUDGMENT IS NOT CONSISTENT WITH DRAWING THE INFERENCES FROM THE FACTS IN RELATORS' FAVOR.

This new evidence obtained by Relators on July 7, 2011, compels reconsideration of the judgment in favor of Mr. Prince. The controlling law makes it clear that the Court must draw the factual inferences in Relators' favor. Indeed, it must do so even if those inferences are "improbable." *Cole v. Cole*, 633 F.2d 1083, 1090 (4th Cir. 1980)("court is obliged to credit the factual assertions contained in the material before it which favor the party resisting summary judgment and to draw inferences favorable to that party if the inferences are reasonable (***however improbable they may seem***)" (emphasis added); *see United States v. Diebold Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) (*"*inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion.").

Intent is difficult to assess on summary judgment, although in this Circuit, the Court clearly is permitted to exercise a gate-keeping role before subjecting high-level executives to trial based on overt acts by their subordinates. Yet it is important that the gate not be slammed too early, or slammed without consideration of the entire text of the False Claims Act, including the "deliberate ignorance" and "reckless disregard" language. Under the False Claims Act, "knowingly" means that "a person, with respect to information, (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information[.]" 31 U.S.C. § 3729(b). According to the Senate Committee Report to the 1986 amendments to the False Claims Act, Congress broadened the statute's definition of "knowingly" to prevent defendants from evading

liability through "'ostrich-like' conduct which can occur in large corporations" where "corporate officers . . . insulate themselves from knowledge of false claims submitted by lower-level subordinates." S. Rep. No. 99-345, at 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272.

False Claims Act jurisprudence makes clear that a top company executive such as Mr. Prince may be found liable if he fails to supervise adequately company activities and fails to ensure normal business practices are being followed. In *United States v. Rachel*, 289 F. Supp. 2d 688, 2003 WL 22462387 (D. Md. July 10, 2003), the District Court in Maryland considered similar facts, and concluded summary judgment was not warranted on facts far less suspect than those found here. In that case, the United States sued defendants companies, owner, and owner's wife. The wife sought summary judgment, claiming she knew nothing about the fraud. The United States introduced evidence that she permitted her husband use and sign her name, and to conduct business in her name, and that the fraudulent invoices were prepared in the kitchen of the home they shared. She also served as a director of the corporation that submitted inflated invoices to a prime contractor. The Court held "the Court is satisfied that Priscilla Rachel acted at least in reckless disregard of the truth or falsity of the information being submitted by CSM to RGI and eventually to the IRS. She served on the board of directors of RGI and had obligations with respect to the performance of those duties. She was identified in the documents as an incorporator, officer, and directors of CSM. John and Priscilla Rachel admitted that she allowed her husband to use her name and her identity to conduct business for her. Based on the above discussion, the Court concludes that summary judgment as to Priscilla Rachel based on the level of her involvement is inappropriate." *Id. at &*7* (internal citations to record omitted).

As another example, in *United States ex rel. Compton v. Midwest Specialities, Inc*., 142 F.3d 296, 304 (6th Cir. 1998), the court found that the company president's intent rose to the

"reckless disregard" standard when he knew the government contract required testing of brake shoes, lacked any evidence that the brake shoes were tested, and told the government that they had been tested.

In *Ahdelkhalik v. United States*, 1997 U.S. Dist. LEXIS 954 at *18-20, the Court held that a store manager could be found liable under the reckless disregard standard based on a lack of supervision. There, the fraud involved exchanging food stamps for cash. There was no evidence that the manager knew of or was personally involved in the fraud. Yet the court found that his failure to supervise alone sufficed as grounds to survive summary judgment. The court pointed out that the typical business practice of counting money at the end of the day should have alerted the manager that money had been taken.

In *United States v. Mack*, 2000 U.S. Dist. LEXIS 17367, (S.D.Tx. 2000), the Court held that summary judgment was not appropriate because defendant could be found liable under a reckless disregard standard because he had failed to provide adequate supervision of his billing staff. The court found that he was put on notice as to the shortcomings in his billing systems, yet failed to fire full time billing staff, and failed to require his staff to read the relevant government publications on billing.

Here, Mr. Prince was far more involved. He actually ran the company on a day-to-day basis as the CEO. It is undisputed that WPPS II was the primary source of revenue for the company, dwarfing all the other contract revenues. Based on the summary judgment record, the Court held that "[i[n the absence of ***anything*** to alert Prince to the falsity of USTC's musters and travel invoices for WPPS II, and given that Prince's companies had multiple government contracts, there is no basis on which a reasonable juror could conclude the Prince was reckless or willfully blind by not personally scrutinizing or involving himself in the claim submission

process for the WPPS II contract." Dkt. No. 457 at 12 (emphasis added). But clearly, the new evidence about the OIG audit report requires reconsideration of that ruling, as the OIG audit served to alert Mr. Prince to the falsity of the musters.

The new evidence makes it clear that the State Department OIG audit put Mr. Prince on notice that his company may be overbilling for labor – in an amount in excess of $300 million. No one has testified that the executive team kept the CEO Mr. Prince in the dark about the OIG findings.[5] The new evidence shows that executives Jackson, Taylor, Roitz, and Esposito, acting as a group, misled the OIG audit team by making both verbal and written misrepresentations.

Relators also bring to the Court's attention two other facts not cited in the Court's decision that, combined with the new evidence, support an inference in Relators' favor on reckless disregard or deliberate ignorance. As of March 27, 2009 (within the timeframe at issue in this lawsuit), Mr. Prince indisputably was on notice that his General Counsel was willing to falsify documents being submitted to the federal government. On that date, Joseph Yorio, the company's new President personally selected by Mr. Prince to replace Gary Jackson, called Mr. Prince up and told him that the General Counsel of the company was trying to obstruct justice by getting Mr. Yorio to falsify a letter to mislead the federal government investigators. Mr. Yorio testified that that government's indictment accurately described the facts about Mr. Howell's

[5] The Court is under the misimpression that the Relators "apparently chose not to ask specific questions about Prince's knowledge of the pertinent audit reports." Dkt. No. 457 at 13. Unfortunately, Relators did not have the audit reports when they deposed Mr. Prince. Discovery began in this case on July 12, 2010. At the time Relators deposed Mr. Prince (August 23, 2010), Defendants had not produced ***any*** documents whatsoever. Relators also respectfully note that the Court may be under the misimpression regarding the length of the discovery period. As a result of court stays, discovery occurred from July 12 – August 27, 2011, and from January 5 to April 29, 2011 for a total of 23.5 weeks (approximately six months total). It took Relators multiple motions to compel to overcome Defendants' persistent refusal to produce any documents except the contract and the invoices submitted to the government. Because Defendants produced a full third of all the records after the conclusion of discovery, Relators had to depose *all* of the witnesses without having all their emails and other documents.

communications with Mr. Yorio. *See Exhibit 3* (Yorio testimony and indictment excerpts regarding Howell).

Note, this is not a question of drawing an adverse inverse from Mr. Howell taking the Fifth. This is sworn testimony directly from Mr. Yorio that he personally told Mr. Prince about Mr. Howell's intent to obstruct justice. Further, Mr. Prince admitted that Mr. Yorio called and told him about General Counsel Howell's intent to obstruct justice. *See Exhibit 4* (*Prince Tr. 253*.)

Surely, on March 26, 2009, after Mr. Prince learns his General Counsel is falsifying documents, Mr. Prince had a duty to inquire what other documents Mr. Howell falsified or destroyed. After all, this is the company's General Counsel – the very man tasked with making sure that documents were retained and not altered. If Mr. Prince had investigated at all, he easily could have discovered the falsified travel documents, as there is an extensive paper trail of the misconduct.

That paper trail shows the roles played by the other executives Roitz, Taylor, Esposito, and Jackson. That same paper trail shows how these executives contemplated turning over the BDO Seidman investigation to the OIG auditors, but decided not to do so. Once Mr. Prince, the chief executive officer of the company, learned his General Counsel was willing to falsify documents to evade legal liability, he had to act. Instead of investigating the full extent of Mr. Howell's document falsifications, Mr. Prince did nothing except decide to pay Mr. Howell and the others on the management team (Jackson, Roitz, Taylor, Esposito) ***more*** money for ***not*** working than he had paid them for working. Taking the new evidence on the OIG report, and considering the Yorio testimony, and drawing all inferences in Relators' favor leads to the

inescapable conclusion that Mr. Prince should not be dismissed from this case without a bench trial.

CONCLUSION

For the reasons set forth above, Relators respectfully request that order granting summary judgment in favor of Erik Prince be reconsidered, and set aside. If the July 25 trial results in a jury verdict for the United States, this Court should convene a bench trial to hear evidence on Mr. Prince's role in the fraud, and assess the credibility of the witnesses. If the July 25 trial results in a verdict for defendant, this Court should enter summary judgment for Mr. Prince at that time.

Respectfully submitted,

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Dated: July 11, 2011

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of July 2011, we filed the foregoing Motion for Reconsideration using the CM/ECF system, which will send a notification to counsel for Defendants and counsel for the United States.

/s/Susan L. Burke
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